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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARIA FERRADAS SOLIZ,
Plaintiff and Appellant,

ORLANDO A. SOLIZ,
Plaintiff, Cross-defendant and Appellant,

v.

CITY OF BIG BEAR LAKE et al.,
Defendants, Cross-complainants and Appellants.

E067555

(Super.Ct.No. CIVDS1409268)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J. Schneider, Jr., Judge. Affirmed in part; reversed in part with directions.

Dordick Law Corporation and Gary A. Dordick; Kuzyk Law and Robert Ryan; The Ehrlich Law Firm and Jeffrey I. Ehrlich, for Maria Ferradas Soliz and Orlando A. Soliz.

Pollak, Vida & Barer and Daniel P. Barer; Grossberg & Hoehn, Scott J. Grossberg and Jacob M. Ramirez for Defendants, Cross-complainants and Appellants.

Maria Ferradas Soliz and Orlando Soliz were injured when their car collided with a car driven by Jeffrey Mathieu, City Manager of the City of Big Bear Lake.[1] Following trial, the jury found Orlando and Mathieu to each be 50 percent at fault and awarded appellants damages. Arguing in part that the damages award was inadequate, appellants filed a motion for a new trial, which the trial court denied.

Both sides then filed costs bills, as well as motions to tax costs. The motions in part disputed the validity and effect of an offer to compromise pursuant to Code of Civil Procedure section 998[2] that respondents served on Maria before trial. The trial court found that the section 998 offer was invalid; as a result, it denied respondents' motion and granted appellants' motion.

Both sides appeal. Appellants contend that the trial court erred in denying their motion for a new trial. Respondents contend that the trial court erred when it found that their section 998 offer was invalid. We reverse in part, holding that Maria is entitled to a new trial on damages, and otherwise affirm the judgment in all respects.

I. FACTUAL AND PROCEDURAL HISTORY

A. *The Accident*

On January 12, 2014, Orlando and Maria were driving home from Big Bear Lake on a highway with one lane in each direction. Orlando was driving southbound while

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[1] For clarity, we refer to the Solizes as appellants and Mathieu and the City of Big Bear Lake as respondents. We also refer to appellants individually by their first name only. We intend no disrespect.

[2] Further undesignated statutory references are to the Code of Civil Procedure.

Maria, his wife, sat in the front passenger seat. Mathieu, driving behind appellants, attempted to pass their car by moving into the northbound lane. While Mathieu was passing, Orlando, who did not see Mathieu's car, began to make a left turn onto a dirt road. The cars collided, the left front corner of appellants' car striking the right side of Mathieu's car.

Orlando's head struck the window of appellants' car before hitting a snowboard positioned between the front seats. Maria's neck also hit the snowboard. Following the accident, Orlando requested assistance from the California Highway Patrol but did not believe medical assistance was necessary. That night, after arriving at their home in Lancaster, Orlando and Maria went to the emergency room. Orlando had aches in his back, shoulder, and head. Approximately a week later, Orlando saw Dr. Mehul Taylor for muscle pain in his upper body. Orlando eventually received a cortisone injection, which improved most of his symptoms.

Maria's injuries were more extensive than Orlando's. At the emergency room, Maria could not move her neck or upper back. When she later saw Taylor, Maria rated her pain at a 7 to 8 out of 10. Taylor referred Maria to Dr. Abdallah Farrukh, who determined that Maria had three abnormal spinal discs and recommended cervical fusion surgery. Farrukh performed the surgery approximately two months after the accident.

Maria's pain did not subside after this first surgery. In February 2015, Maria saw Dr. Justin Paquette, who recommended surgery to insert an artificial disc and remove screws (implanted from the first surgery) protruding into Maria's throat. Paquette performed this second surgery in May 2015.

The pain still did not improve after the second surgery. In December 2015, Maria saw Dr. Fardad Mobin, who recommended that Maria have a spinal cord stimulator implanted for pain management. According to Mobin, a spinal cord stimulator is not intended to cure all pain, but rather to "knock the pain down by 50 or 60 percent." Maria had the spinal cord stimulator implanted in August 2016.

B. *Procedural History*

Appellants filed suit in 2014, alleging negligence and other causes of action. Respondents filed a cross-complaint against Orlando, alleging that he was responsible for the accident.[3] Trial began in September 2016.

In July 2016, respondents served a section 998 offer on Maria, offering her $2,000,001 to dismiss her complaint. The offer was conditioned on, among other things, "[t]he execution and transmittal of a Settlement Agreement and Release of All Claims by PLAINTIFF [Maria] in favor of the DEFENDANTS; that Settlement Agreement and Release of All Claims to be drafted by counsel for the DEFENDANTS." Maria did not accept the offer, which eventually expired.

Much of the trial focused on Maria's past and future medical care. Maria testified that, since the accident, there was "not much" she could do physically and that she needed assistance with walking. Mobin, testifying as appellants' medical expert, opined that the accident caused Maria's symptoms and necessitated the surgeries. Mobin also testified that Maria "is going to have pain for the foreseeable future if not for the rest of

[3] Although the cross-complaint sought damages arising from Orlando's alleged negligence, respondents did not pursue these damages at trial.

her life." Dr. Ronald Fisk, another one of appellants' medical experts, opined that Maria would never be pain free given the procedures she has undergone, and that even with "perfect care" she would have significant pain for the rest of her life. Dr. Cary Alberstone, respondents' medical expert, disagreed as to causation, opining that the accident did not injure Maria's spine, that Maria had preexisting conditions, that the surgeries were unnecessary, and that the later surgeries were caused by mistakes of the previous ones. Alberstone acknowledged, however, that Maria had been experiencing "constant severe neck pain from the time of the accident" through the time of trial.

At one point, respondents introduced undercover video footage of Maria walking and standing in line at a pharmacy. The video was recorded on August 2, 2016, approximately a month prior to trial but before Maria had her spinal cord stimulator implanted. In the video, Maria, wearing a neck brace, walked around the pharmacy without assistance, appeared to reach for a cell phone from her back pocket, used her fingers to input information into a credit card terminal, and adjusted her hair with her hands. Maria later testified that the video failed to show that she needed her mother's assistance to get in and out of their car, that she has had greater difficulty walking since her spinal cord stimulator was implanted, and that although she had stopped taking her pain medication during portions of the trial to be able to testify, she was generally on pain medication the rest of the time.

The jury found that Mathieu and Orlando were each 50 percent responsible for the accident. The jury awarded Orlando $7,520 for past medical expenses and nothing for past or future pain and suffering. For Maria, the jury awarded (1) $760,773.86 for past

medical expenses, which were the exact amount her medical billing expert opined was the reasonable cost of her past medical care, (2) $300,000 for future medical expenses, (3) $50,000 for past pain and suffering, (4) nothing for future pain and suffering, and (5) $57,000 for past and future lost wages, for a total of $1,167,873.86.

The trial court entered three judgments—one on the complaint reflecting Orlando's damages, one on the complaint reflecting Maria's damages, and one on the cross-complaint—which collectively took Orlando's proportionate liability into account and awarded appellants damages in a net amount of $587,696.93.

Among other posttrial motions, appellants moved for a new trial, contending in part that the jury's award of zero for Orlando's past and future pain and suffering, zero for Maria's future pain and suffering, and $50,000 for past pain and suffering were inadequate as a matter of law. The trial court denied the motion.

Maria filed a costs bill, and respondents moved to tax costs. Maria sought approximately $33,000 in costs.[4] Respondents' motion to tax costs argued that most of this amount was incurred after the section 998 offer and was therefore unrecoverable because she failed to obtain a judgment more favorable than the offer. In opposition, Maria reduced the claimed amount to approximately $29,000 but otherwise contended that the costs were recoverable because the section 998 offer was invalid.

Respondents also filed a costs bill seeking approximately $160,000 from Maria based on the rejected section 998 offer, which Maria contested in appellants' own motion

[4] Orlando separately submitted a cost bill that is not at issue on appeal. As well, a separate cost bill filed by respondents against Orlando is not at issue.

to tax costs. The trial court denied respondents' motions and granted appellants' motions, awarding Maria $29,000 in costs and concluding that the section 998 offer was invalid because it was conditioned on a settlement agreement, the terms of which were unknown. This appeal and cross-appeal followed.

II. MOTION FOR NEW TRIAL

Appellants contend that the amount awarded to them in damages was inadequate, specifically focusing on three items: (1) Orlando's award of zero for pain and suffering, (2) Maria's award of zero for future pain and suffering, and (3) Maria's award of $50,000 for past pain and suffering. We address each of these in turn.

A. *Applicable Law*

Section 657 provides that a new trial may be granted on the basis of "inadequate damages" or "[i]nsufficiency of the evidence to justify the verdict." If the motion for a new trial is denied, we review the judgment. (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.) In doing so, we recognize that ordinarily "a trial court has complete discretion in ruling on a motion for a new trial," and its ruling "will not be disturbed absent an abuse of discretion." (*Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 452.) "'An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] Accordingly, we can reverse the denial of a new trial motion based on insufficiency of the evidence or [inadequate or] excessive damages only if there is no substantial conflict in the evidence and the evidence compels the conclusion

that the motion should have been granted.' [Citation.]" (*Rayii v. Gatica* (2013) 218 Cal.App.4th 1402, 1415-1416.) "'In determining whether there has been an abuse of discretion, the facts on the issue of damage most favorable to the respondent must be considered.'" (*Miller v. San Diego Gas & Elec. Co.* (1963) 212 Cal.App.2d 555, 559 (*Miller*).)

"The amount of . . . damages to award for pain and suffering is a subjective determination that is particularly within the discretion of the jury." (*Rayii v. Gatica*, *supra*, 218 Cal.App.4th at p. 1416; see also *Beagle v. Vasold* (1966) 65 Cal.2d 166, 172 ["One of the most difficult tasks imposed upon a jury in deciding a case involving personal injuries is to determine the amount of money the plaintiff is to be awarded as compensation for pain and suffering."].) As a result, "[t]he amount to be awarded is 'a matter on which there legitimately may be a wide difference of opinion' [citation]." (*Seffert v. Los Angeles Transit Lines* (1961) 56 Cal.2d 498, 508.) Generally, a damages award for pain and suffering must "shock the conscience" to be overturned. (*Buniger v. Buniger* (1967) 249 Cal.App.2d 50, 54.)

Even a complete failure to award any damages for pain and suffering is not per se inadequate. Although courts "[i]n some cases . . . have found jury awards which fail to compensate for pain and suffering inadequate as a matter of law," "'[e]very case depends upon the facts involved.'" (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 936 (*Dodson*).) For example, in *Miller*, the Court of Appeal found that the trial court did not abuse its discretion in denying a motion for a new trial where the jury "'may well have believed that plaintiffs' injuries . . . [were] most minimal, to the point of being incapable

of evaluation, and that plaintiffs would be fairly compensated if they only received their [special damages].'" (*Miller, supra*, 212 Cal.App.2d at p. 559, quoting *Giddings v. Wyman* (1961) 32 Ill.App.2d 220, 223-224.) In such situations, "it seems entirely probable that the jury [would feel] that although [a] plaintiff was entitled to no more than nominal damages, the kindest disposition of the case [would be] to award to [the plaintiff] an amount at least equivalent to [the plaintiff's] medical bills." (*Miller, supra*, at p. 560.) However, "[a] plaintiff who is subjected to a serious surgical procedure must necessarily have endured at least some pain and suffering in connection with the surgery," and "[w]hile the extent of the plaintiff's pain and suffering is for the jury to decide, common experience tells us it cannot be zero." (*Dodson, supra*, 154 Cal.App.4th at p. 938.)

B. *Orlando's Award*

Approximately a week after the accident, Orlando saw Taylor with complaints of pain largely in the neck and shoulder area. Orlando rated the severity of pain at a 3 out of 10. Taylor prescribed anti-inflammatories, muscle relaxants, and physical therapy. An MRI taken at a follow-up visit showed a strain on Orlando's rotator cuff. Taylor recommended a cortisone shot into Orlando's shoulder, which Orlando testified improved his symptoms by "about . . . 85 to almost 90 percent" almost immediately. Orlando has "continued to do well" since the injection, which took place no more than a month or two following the accident.

The relatively minor nature of Orlando's injuries from the accident justified the jury's award of zero for pain and suffering. As may have been the case in *Miller*, the jury

here may have believed that Orlando's injuries were minimal and that he would be fairly compensated if he were awarded special damages for his medical expenses.[5] (*Miller*, *supra*, 212 Cal.App.2d at p. 559; see also *Gallentine v. Richardson* (1967) 248 Cal.App.2d 152, 155 [no abuse of discretion where "evidence of general damages is minimal"].)

In contending otherwise, appellants rely on *Dodson*, but the reliance is misplaced. *Dodson* held that "[w]here a plaintiff undergoes a serious surgical procedure which a jury's special verdict attributes to an accident caused in part by the negligence of the defendant, the plaintiff must necessarily have endured at least some pain and suffering, and a damage award concluding otherwise is therefore inadequate as a matter of law." (*Dodson, supra*, 154 Cal.App.4th at p. 938.) In *Dodson*, however, the plaintiff underwent a surgery involving the removal of a herniated disk and the insertion of a metallic plate. (*Id.* at pp. 937-938; see also *id.* at p. 938 [plaintiff "was hospitalized, underwent a serious surgery under general anesthesia, received physical therapy, used a walker for some time after the surgery, and so on"].) Because of the surgery the plaintiff underwent, *Dodson* concluded, he "must necessarily have endured at least some pain and suffering." (*Ibid.*) *Dodson*, however, expressly limits its applicability to those who undergo a "serious surgical procedure." (*Ibid.*) Nothing in *Dodson* suggests that relatively minor injuries requiring no hospitalization or surgery require an award for pain and suffering, and cases requiring a new trial based on inadequate damages have consistently involved injuries

[5] The jury awarded $7,520 for Orlando's medical expenses, which his medical billing expert testified was the reasonable cost for his treatment.

much more severe than Orlando's. (See *id.* at p. 936 & fn. 3; *Clifford v. Ruocco* (1952) 39 Cal.2d 327, 328-329 [plaintiff underwent unsuccessful operation and was hospitalized for 24 days]; *Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 583 [fracture of cheek and jaw bones requiring surgery]; *Buniger v. Buniger*, *supra*, 249 Cal.App.2d at pp. 53-54 [plaintiff hospitalized for 31 days following surgery]; *Gallentine v. Richardson* (1967) 248 Cal.App.2d 152, 153 [plaintiff's gunshot wound required surgery and three-day hospitalization]; *Bencich v. Market St. Ry. Co.*(1937) 20 Cal.App.2d 518, 521-522 [crushed foot required partial amputation and six-month hospitalization].)

Here, Orlando did not undergo surgery and was never hospitalized; rather, the cortisone injection he received soon after the accident immediately improved his symptoms, which he had initially rated at a 3 out of 10 in terms of severity. The jury's award of zero for pain and suffering was not inadequate as a matter of law, and there is no appropriate basis to disturb it.

C. *Maria's Award*

Unlike Orlando, Maria underwent multiple serious surgical procedures, including multiple back surgeries and a spinal cord stimulator implant. Witnesses for both sides testified that Maria remained in severe pain at least through the time of trial. Furthermore, no one disputed that Maria would remain in significant or severe pain for the foreseeable future. Under these circumstances, even when viewing the facts in the light most favorable to respondents, the jury's award of zero for future pain and suffering was legally inadequate.

In *Miller*, the Court of Appeal held that "a judgment for no more than the actual medical expenses occasioned by [a] tort would be inadequate" where "the right to recover was established and . . . there was also proof that the medical expenses were incurred because of defendant's negligent act." (*Miller, supra*, 212 Cal.App.2d at p. 558.)[6] *Dodson*, applying *Miller*, concluded that "[a] plaintiff who is subjected to a serious surgical procedure must necessarily have endured at least some pain and suffering in connection with the surgery" and that "[w]hile the extent of the plaintiff's pain and suffering is for the jury to decide, common experience tells us it cannot be zero." (*Dodson, supra*, 154 Cal.App.4th at p. 938.)

Here, the jury awarded the exact amount Maria sought in past medical expenses, necessarily finding that her multiple surgeries were caused by respondents' negligence. (See Civ. Code, § 3333 [damages in tort are generally "the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not"].) If, as the jury concluded, Maria's stimulator was needed as a result of respondents' negligence, then any future procedures relating to the stimulator would be necessary as well.

Witnesses for both sides indicated that future procedures, such as potential wiring fixes and battery replacements, are not trivial ones. Dr. Sharon Kay Kawai, appellants' life care plan expert, testified: "The [spinal cord stimulator] itself can last forever. It

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[6] As mentioned previously, *Miller* also held that where there is "a substantial conflict as to whether [a] plaintiff received any substantial injury," a jury may properly award no general damages. (*Miller, supra*, 212 Cal.App.2d at p. 560.)

could be replaced. It depends on the wiring and if [Maria] would have a fall. I've had some patients who fall, the wiring may be displaced and they have to undergo another surgery." Mobin stated that electrical contacts in the spinal cord stimulator "come in contact with the back of the spinal cord." And Amy Sutton, respondents' life care plan expert, indicated that even a routine battery change for the stimulator would require an anesthesiologist. Such statements show that it is possible that Maria may need future back surgery to correct potential complications and that, at a minimum, some surgery for battery replacements is certain. Thus, Maria will undergo one or more "serious surgical procedure[s]" (*Dodson*, *supra*, 154 Cal.App.4th at p. 938) in the future as a result of respondents' negligence. Accordingly, even after viewing all facts in respondents' favor, the jury's award of zero for future pain and suffering is inadequate as a matter of law.

The fact that respondents showed an undercover video at trial of Maria walking around without apparent difficulty is not enough to allow the jury discretion to award nothing for future pain and suffering. As Maria testified, the video was recorded before her spinal cord stimulator was implanted, and in any event her apparent ease in the video does not negate the fact that she will indisputably be in pain for the foreseeable future or that she will have to undergo serious surgical procedures as a result of respondent's negligence.

In sum, the evidence "'compels the conclusion that the motion [for new trial] should have been granted'" (*Rayii v. Gatica*, *supra*, 218 Cal.App.4th at p. 1416), at least as to Maria, and the award of zero for future pain and suffering was inadequate as a matter of law.

A new trial may be limited to a specific issue if that issue is severable from others not retried. (See *Hamasaki v. Flotho* (1952) 39 Cal.2d 602, 608-609; *Barmas, Inc. v. Superior Court* (2001) 92 Cal.App.4th 372, 375.) The issue of Maria's damages is distinct from the issue of Orlando's damages. Similarly, questions regarding damages are separate from those regarding liability.[7] Maria's award of zero for future pain and suffering, however, is not severable from her award for future medical expenses, as the zero award calls into question the rationality of the manner in which the jury calculated all of her future damages. To determine how much to award for future pain and suffering, the new jury will have to determine what injuries or procedures will cause that future pain and suffering, and it would be unreasonable to lock that new jury into the amount that the earlier jury determined. Further, on these facts, having determined that the jury exceeded the bounds of its discretion in determining the amount in future pain and suffering someone who was severely injured is entitled to recover, we conclude that its award for past pain and suffering to Maria should be revisited as well. This is principally because in this case which damages were treated as past, and which as future, is unclear. Accordingly, Maria is entitled to a new trial on damages not limited to her recovery for future pain and suffering.

[7] At oral argument, appellants contended that they are entitled to a new trial as to all issues, including liability. Because their briefs only sought a new trial as to damages, however, we deem any argument that they are entitled to a new trial on liability waived. (*Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 296, fn. 7 ["Issues not raised in the appellant's opening brief are deemed waived or abandoned."].)

III. MOTION TO TAX COSTS

In their cross-appeal, respondents contend that the trial court erroneously found that their section 998 offer to Maria was invalid because it was conditioned on an undisclosed settlement agreement. We disagree; the trial court was correct to find the section 998 offer invalid.

A. *Applicable Law*

"As a rule, prevailing parties, such as appellants here, may recover their litigation and trial costs. (§ 1032.) When section 998 applies, it changes that rule. Under that statute, if the plaintiffs reject a defendant's offer to compromise and then fail to win a more favorable judgment, the plaintiffs cannot recover their postoffer costs and must pay the costs the defendant incurred after the offer." (*Chen v. Interinsurance Exchange of the Automobile Club* (2008) 164 Cal.App.4th 117, 121, fn. omitted; see § 998, subd. (c)(1).) "The policy behind section 998 is 'to encourage the settlement of lawsuits prior to trial.'" (*Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1019.)

Among other requirements, a section 998 offer "must be clear and specific." (*Berg v. Darden* (2004) 120 Cal.App.4th 721, 727.) One reason for this is that the offeree—as well as the court—must be able to determine what the section 998 offer is worth. The offeree must be able to "meaningfully . . . evaluate it and make a reasoned decision whether to accept it, or reject it and bear the risk he may have to shoulder his opponent's litigation costs and expenses." (*Ibid.*) The court must be able to "determine whether the judgment is more favorable than the offer." (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764 (*Fassberg*

Construction); see also *Valentino v. Elliott Sav-On Gas, Inc.* (1988) 201 Cal.App.3d 692, 698.) Thus, a section 998 offer containing a confidentiality clause is invalid because it is "an impossible task" for the court to value the vindication a party receives from a public verdict. (*Barella v. Exchange Bank* (2000) 84 Cal.App.4th 793, 803.) A section 998 offer is invalid for the same reasons if it requires a plaintiff to forego causes of action not identified in the complaint. (*Valentino, supra*, 201 Cal.App.3d at pp. 694-695, 698-701.)

"We independently review whether a section 998 settlement offer was valid. In our review, we interpret any ambiguity in the offer against its proponent. [Citation.] The burden is on the offering party to demonstrate that the offer is valid under section 998. [Citation.] The offer must be strictly construed in favor of the party sought to be bound by it. [Citation.]" (*Ignacio v. Caracciolo* (2016) 2 Cal.App.5th 81, 86.)

B. *Discussion*

Respondents' section 998 offer was expressly conditioned on "[t]he execution and transmittal of a Settlement Agreement and Release of All Claims by PLAINTIFF [Maria] in favor of the DEFENDANTS; that Settlement Agreement and Release of All Claims to be drafted by counsel for the DEFENDANTS." This condition, without the inclusion of a proposed settlement agreement in the section 998 offer itself, rendered the offer invalid.

Recent case law holds that when, as here, a section 998 offer is conditioned on an undescribed and unrevealed settlement agreement, the offer is invalid. In *Sanford v. Rasnick* (2016) 246 Cal.App.4th 1121 (*Sanford*), the defendants served a section 998 offer on the plaintiff conditioned on "[t]he notarized execution and transmittal of a written settlement agreement and general release." (*Sanford, supra*, at p. 1125.) Nothing

from the offeror's counsel "ever disclose[d] any of the terms that they planned to put into the 'written settlement agreement' required as a condition to accepting their offer." (*Ibid.*) In finding that the section 998 offer was invalid, the court stated that it was not aware of any cases "holding that a valid section 998 offer can include a settlement agreement, let alone one undescribed and unexplained." (*Sanford*, *supra*, at p. 1130.) "[T]he terms of a settlement agreement can be the subject of much negotiation," the court reasoned, and by having to accept or reject the offer "without knowing what those terms were," an offeree would end up disagreeing with the offeror over what terms should be included in a settlement agreement after already having agreed to the section 998 offer, and "havoc would ensue." (*Sanford*, *supra*, at pp. 1131-1132, italics in second quote omitted.)

Respondents contend that *Sanford* was wrongly decided for multiple reasons. Respondents first contend that *Sanford* conflicts with *Fassberg Construction*, which permitted a section 998 offer to be conditioned on the execution of a settlement agreement.

Fassberg Construction is easily distinguishable. There, the section 998 offer included the proposed settlement agreement, so both the offeree and the court could evaluate its terms to determine the value of the section 998 offer. (*Fassberg Construction*, *supra*, 152 Cal.App.4th at p. 765.) Thus, both *Fassberg Construction* and *Sanford* are consistent with the notion that conditioning a section 998 offer on an *undisclosed* settlement agreement will render the offer invalid. Here, without knowing

what terms the proposed settlement agreement would include, it was impossible for Maria or the trial court to know what the offer was worth.

Respondents next contend that, pursuant to other cases, ambiguities are not fatal to a section 998 offer "if they could be resolved by [having the offeree pick] up a phone" to give the offeror an opportunity to clarify.

Neither Maria nor her counsel was required under case law to seek clarification or negotiate the terms of an unclear section 998 offer with respondents. As respondents observe, *Berg* stated that "[i]f the offeree is uncertain about some aspect of the offer . . . he is free to explore those matters with the offeror, or even to make counterproposals during the period in which the statutory offer remains outstanding." (*Berg v. Darden*, *supra*, 120 Cal.App.4th at pp. 730-731.) But neither this statement or any other from *Berg requires* an offeree to discuss uncertainties with the offeror.

Hartline v. Kaiser Foundation Hospitals (2005) 132 Cal.App.4th 458, another case respondents rely on, also suggests that it may be in the offeree's best interest to clear up ambiguities with the offeror, but it did not hold that an offeree's failure to do so will render an unclear offer valid. There, the offeree believed that a section 998 offer included an appeal waiver, even though the offer contained no language "from which a waiver of appellate rights might be implied." (*Hartline*, *supra*, at p. 472.) In affirming the trial court's finding that the section 998 offer was made in good faith—an issue distinct from whether the offer was sufficiently specific—the court stated that "the reasonable course of action" would have been to communicate with the offeror and make a counteroffer expressly reserving appellate rights. (*Hartline*, *supra*, at p. 472.) If the

offeror rejected such a counteroffer, the offeree would then have had a stronger basis for his belief, but in the absence of such a record the trial court did not abuse its discretion. (*Id.* at pp. 472-473.) *Hartline* does not stand for the proposition that an offeree's failure to clear up ambiguities will turn an otherwise-invalid section 998 offer into a valid one.

Additionally, cases where the parties actually did negotiate the terms of a section 998 offer do not, as respondents see them, stand for the proposition that an offeree is required to do so. (See *McKenzie v. Ford Motor Co.* (2015) 238 Cal.App.4th 695, 699-700.)

Respondents lastly contend that even if case law does not require the offeree to seek clarification, not imposing such a requirement would contravene section 998's purpose. As respondents put it, if a party receives an unclear section 998 offer, the offeree should not be able to "reject the offer, wait until the end of the case, and then raise his uncertainty as a 'get out of jail free' card to avoid section 998's consequences," because allowing such a tactic would not serve section 998's purpose. But this so-called "get out of jail free" card only works if the offeror sent an invalid section 998 offer in the first place. And it is the offeror who is responsible for ensuring that its section 998 offer is valid. (See *Ignacio v. Caracciolo, supra,* 2 Cal.App.5th at p. 86.) Furthermore, we are not persuaded that allowing the offeree to reject a potentially unclear section 998 offer without first seeking clarification discourages offerees from settling lawsuits prior to trial. The offeree bears the risk that the trial court might determine that the offer was valid after all. (See *Hartline v. Kaiser Foundation Hospitals, supra,* 132 Cal.App.4th at pp. 470-473 [offeree's belief that section 998 offer included appeal waiver was erroneous; his

argument that offer was not made in good faith therefore failed].) If it is only an arguable ambiguity that is preventing the offeree from accepting the section 998 offer, the offeree has great incentive to seek clarification from the offeror.

Here, by conditioning the section 998 offer on a settlement agreement, the terms of which were never disclosed, respondents' offer was invalid because neither Maria nor the trial court had enough information to determine the offer's value. *Sanford* was correct, and the trial court did not err.

IV. DISPOSITION

The judgments in favor of appellants are reversed as to the awards of damages against Maria. The matter is remanded with directions to conduct a new trial limited to determining the amount of damages, but not limited to damages for future pain and suffering, in favor of Maria. The judgments and postjudgment orders are otherwise affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAPHAEL
J.

We concur:

MILLER
Acting P. J.

CODRINGTON
J.